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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1973

No. 73-1924

JAMES R. MUNIZ and BROTHERHOOD OF TEAMSTERS AND AUTO TRUCK DRIVERS LOCAL NO. 70, IBTCHWA,
Petitioners,

vs.

ROY O. HOFFMAN, DIRECTOR, REGION 20, NATIONAL LABOR RELATIONS BOARD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONERS

I

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 492 F.2d 929. The judgment of the court imposing contempt penalties is contained

in the reporter's transcript of the proceedings. (G.A. 41a-48a).[1]

II

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on January 25, 1974. A timely petition for rehearing was denied on March 26, 1974. The petition for writ of certiorari was granted on November 11, 1974. This Court has jurisdiction under 28 U.S.C. § 1254(1).

III

QUESTIONS PRESENTED

1. Whether Article III, Section 2 and the Sixth Amendment to the Constitution mandate a jury trial where a penalty of $25,000.00 ($15,000 suspended) is assessed against a labor organization in a criminal contempt proceeding.

2. Whether petitioners, charged with criminal contempt for an alleged violation of an injunction issued under the National Labor Relations Act, are entitled to a trial by jury under 18 U.S.C. § 3692, which provides that alleged contemnors are entitled to a jury trial in all contempt cases "arising under the

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[1] "G.A." refers to the Appendix to the "Memorandum for the Respondent," dated October, 1974. "J.A." refers to the Joint Appendix filed herein. The opinion of the court below is attached as an appendix to the petition for writ of certiorari.

laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute."

IV

STATUTES INVOLVED

United States Constitution, Article III, § 2:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury. . . ."

United States Constitution Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ."

Title 18, United States Code, Section 3692 provides:

"Jury trial for contempt in labor dispute cases

"In all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed.

This section shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice nor to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders or process of the court."

V

STATEMENT OF THE CASE

This labor dispute arises out of a strike and picketing by Local 21 of the International Typographical Union (hereinafter Local 21) against the Independent-Journal newspaper (hereinafter I-J). This dispute resulted in two separate district court actions which culminated in the civil and criminal contempt convictions involved herein. Petitioner Local 70 was not a striking union and had no collective bargaining relationship with the I-J.

In early January, 1970, Local 21 went on strike against the I-J a daily newspaper serving the Marin County area north of San Francisco. Picketing by Local 21 began at the premises of the I-J in San Rafael. In late January Local 21 begain picketing in San Franicsco where newsprint from Canada destined for the I-J was being unloaded from barges. Longshoremen members of Local 10 of the International Longshoremen's & Warehousemen's Union respected the picket lines and refused to unload newsprint from the ships to dockside. In addition, members of two Teamster locals—Local 85 of San Francisco and Local 287 of San Jose—similarly refused to cross the picket lines to load and haul the newsprint by truck the 20 miles north to San Rafael.

Unfair labor practice charges were filed with the National Labor Relations Board against the unions involved; the Regional Director of the Twentieth Region (Respondent herein) obtained a temporary restraining order pursuant to 29 U.S.C. § 160(1)

against Local 21's picketing of the dock. The theory of the petition for the temporary restraining order was that an illegal secondary boycott was involved against the companies responsible for transporting the newsprint. Simultaneously, an order to show cause was issued which required Local 21, Local 85 and Local 287 to show cause two days later on February 13 why a preliminary injunction should not issue.[2] The preliminary injunction was issued February 13, 1970, against these three labor organizations[3] only, "enjoining further picketing at the pier and further acts designed to cause the neutral employers to refuse delivery of newsprint." 492 F.2d at 931. Petitioner Local 70 was not named in either the unfair labor practice charge nor named as a party to the injunction and was totally uninvolved in the transaction at the pier.

Subsequently, Local 21 commenced consumer picketing of stores in Marin County which advertised in the I-J. Unfair labor practice charges predicated on further illegal secondary boycotting were filed against Local 21. The Regional Director petitioned the district court in a second action for the issuance of a

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[2]This was Case No. C-70-306 LHB (N.D. Ca.). For the text of the injunction see J.A. 6-9. The "Petition for Adjudication in Civil Contempt and for Other Relief; and Request for Institution of, Adjudication In, and Punishment for Criminal Contempt" (J.A. 14-36) was filed and docketed under caption, Case No. C-70-895 WTS (N.D. Ca.), which case involved the second temporary injunction issued. The petition claimed violations of both injunctive decrees.

[3]Local 10 of the I.L.W.U. became involved when it was served with the temporary restraining order on the day it was to expire—February 13.

second injunction against Local 21's activity.[4] On April 28, 1970, Local 21 entered into a stipulation with the National Relations Board agreeing to a temporary injunction prohibiting Local 21 from picketing certain named retail stores and "other firms which advertised in the Independent-Journal; where an object of the picketing [was] to cause customers of such firms to cease buying products not advertised in that paper." (J.A. 12-13). Petitioner Local 70 was not named in either the unfair labor practice charge nor named as a party to the injunction nor did it have notice of or participate in the injunction proceedings.

In the middle of October, 1970, further activity in Marin County developed. The court below characterized this conduct as follows:

> "The effort broadened to boycott or quarantine San Rafael and all of Marin County, curtailing deliveries of all supplies, causing traffic tie-ups and attempting to prevent delivery trucks from entering exit ramps from main highways to enter the city." 492 F.2d at 932.

The National Labor Relations Board through the Regional Director filed a petition seeking to hold Locals 21, 85, and 10 and their officers in civil and criminal contempt of both previous injunctions. (J.A. 14-36). The contempt petition claimed that "Respondents embarked upon a joint plan, program and

[4]This is Case No. C-70-895 WTS (N.D. Ca.). For the text of the injunction see J.A. 10-13.

campaign to create a boycott of goods, materials, commodities and services . . ." (J.A. 22).

Local 21's efforts to block deliveries in Marin County affected members of Local 70. Although its jurisdiction is Alameda County, its drivers, in the course of their work, make deliveries in Marin County and elsewhere around the Bay Area. The evidence is overwhelming as to Local 21's campaign to block deliveries and otherwise enforce a secondary boycott. There is also evidence in the record that drivers from many Teamster locals including 70 refused to cross the picket lines or to make deliveries in Marin County during the week and a half preceding the filing of the contempt petition. Local 70's involvement in the boycott scheme was, according to the National Labor Relations Board, reflected by the presence of petitioner James Muniz, the President of Local 70, and business agents of the Local in Marin County during the week and a half in which Local 21 maintained its picket lines.[5]

Swept into the case as accused contemnors were petitioners—James Muniz and Local 70. While neither petitioner was the subject of any unfair labor practice charge nor a party to either injunction proceeding, the Board sought to prove that petitioners had acted in concert and participation with parties to the injunction since neither had been given actual notice of either injunction by personal service or in any other way.

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[5]Brief of the National Labor Relations Board to the Ninth Circuit, pp. 20-21.

On October 23, 1970, the contempt trial began before Judge Sweigert,[6] the same judge who signed the stipulated preliminary injunction. All respondents including Petitioners Muniz and Local 70 were charged with both civil and criminal contempt, and moved for a bifurcation of the proceedings. Rather than bifurcate the proceedings according to the procedure suggested in *United States v. United Mine Workers,* 330 U.S. 258, 299 (1947), the court tried the civil and criminal allegations simultaneously.

Petitioners Muniz and Local 70 demanded a jury trial as to the criminal contempt, and argued that Title 18, Section 3692 guaranteed the right of a jury trial in such a labor dispute. In addition, these alleged contemnors argued that they had a constitutional right to a jury trial, relying on this Court's decisions in *Cheff v. Schnackenberg,* 384 U.S. 373 (1966) and *Bloom v. Illinois,* 391 U.S. 194 (1968). The motion for a jury trial was denied by the court. (J.A. 54-55).[7]

After a trial of the alleged contempt which lasted for approximately fifteen days, Judge Sweigert concluded that petitioners had "knowingly and willfully, and with intent to defy, disobeyed, violated, resisted and disregarded [the Court's orders] . . ." (G.A. 40a). Notwithstanding the fact that Local 21 was the prime participant in the labor dispute, the court inflicted the same criminal penalty on each union; a $25,000 fine,

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[6]Petitioners Muniz and Local 70 were represented by separate counsel uninvolved in any of the prior proceedings.

[7]After the court imposed substantial fines, these issues were raised in renewed motions and summarily denied. (G.A. 46a-48a).

$15,000 of which was to be remitted at the end of a year (G.A. 43a-44a).[8] As to the individuals, the Court placed them "on probation for one year, subject to the Court's right to shorten or to extend that period. . . ." (G.A. 45a-46a).

This appeal followed.

VI

SUMMARY OF THE ARGUMENTS

A. The Constitutional Issue

"Serious" criminal contempts are subject to the jury trial provisions of Art. III, Section 2 and Amend. VI, United States Const., *Bloom v. Illinois,* 391 U.S. 194 (1968); *Duncan v. Louisiana,* 391 U.S. 145 (1968); *Frank v. United States,* 395 U.S. 147 (1969); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968).

Whether or not a crime is "serious" is measured by objective standards, the dividing line between serious and petty offenses for federal courts being governed by Congressional intent as expressed in 18 U.S.C. § 1 (3); *Frank v. United States, supra; Baldwin v. New York,* 399 U.S. 166 (1970); *Codiposti v. Pennsylvania,* ..... U.S. ..... (41 L.Ed.2d 912) (1974); *United*

[8]Prior to imposing sentences the court called for a "pre-sentence" report from the Board which was treated as a probation report. (J.A. 47-52). The Board argued that "the contumacious conduct of respondents [was] of extremely serious nature," and that "the Court can . . . be vindicated by the imposition of substantial fines. . . ." (J.A. 52).

States v. Polk, 438 F.2d 377 (6th Cir. 1971); *North American Coal Corp. v. Local 2262, United Mine Workers of America,* 497 F.2d 459, 467, n.4 (6th Cir. 1974); *In Re Union Nacional de Trabajadores,* 502 F.2d 113 (1st Cir. 1974).

Where a fine, rather than imprisonment, is imposed, the contempt may nevertheless be serious where the amount of fine exceeds the $500 limitation set forth in 18 U.S.C. § 1(3). *United States v. Polk, supra; North American Coal Corp. v. Local 2262, United Mine Workers of America, supra; In Re Union Nacional de Trabajadores, supra.*

Since the amount of fine imposed upon petitioner exceeds the $500 limitation for summary proceedings in contempt, petitioner is entitled to a jury trial. Article III, Section 2; Amend. VI, U.S. Const.

B. The Statutory Issue

Petitioners, in addition to the constitutional issue, rely upon the unambiguous language of § 3692 for a convincing basis for their entitlement to a jury trial in this case. There is no lack of clarity or uncertainty in this section which requires this Court to consider legislative materials. Similarly, there are no conflicting statutes which require accommodation.

The First Circuit, in *In Re Union Nacional de Trabajadores,* 502 F.2d 113, read the statute in its natural meaning and found no persuasive reason to create any limitation on the meaning or intent of the statute. To a large extent, petitioners rely on the well-fashioned opinion of Chief Judge Coffin.

However, a review of the process of codification of § 3692 in 1948 does reveal significant circumstantial and direct evidence that Congress intended § 3692 to have a very encompassing meaning. See Part XIII.

Similarly, neither sections 10(h) or 10(l), 29 U.S.C. §§ 160(h) or (l), of the Labor-Management Relations Act broadens the criminal contempt power of courts so as to require any accommodation with § 3692. See Parts XI and XII.

The broad reading of § 3692 is consistent with the principles the statute embraces and the labor relations policy expressed in the Labor Management Relations Act and the Norris-LaGuardia Act.

THE CONSTITUTIONAL ISSUE

VII

TRIAL BY JURY IS REQUIRED WHERE A CRIMINAL CONTEMNOR IS FINED $10,000 FOR INDIRECT CONTEMPT BY WILLFULLY DISOBEYING A COURT ORDER.[9]

Introduction

From *Green v. United States,* 356 U.S. 165 (1958) to *Codiposti v. Pennsylvania,* 41 L.Ed.2d 912 (1974), and *Taylor v. Hayes,* 41 L.Ed.2d 897 (1974), this Court has agonized over when, if at all, trial by jury may be had by alleged criminal contemnors. See

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[9]Petitioner Muniz, having been placed on probation with neither fine nor imprisonment imposed, does not raise this jury trial issue as a constitutional issue—but is entitled to a jury trial under § 3692. See, *Frank v. United States,* 395 U.S. 147 (1969).

United States v. Barnett, 376 U.S. 681 (1964); *Cheff v. Schnackenberg,* 384 U.S. 373 (1966); *Shillitani v. United States,* 384 U.S. 364 (1966); *Bloom v. Illinois,* 391 U.S. 194 (1968); *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216 (1968); and *Frank v. United States, supra.*

The evolution of entitlement to trial by jury for certain criminal contempts has been guided and determined in part by resolution of the question as to when a jury trial is required in criminal cases not involving contempt. *Duncan v. Louisiana,* 391 U.S. 145 (1968); *Baldwin v. New York,* 399 U.S. 66 (1970).

Insofar as they are relevant to this case, the applicable rules may be summarized as follows:

(a) When the purpose of a contempt conviction is to punish for past conduct, the contempt is criminal. *Shillitani,* at 368;

(b) Serious contempts are so similar to other serious crimes that they are subject to jury trial provisions just like other serious crimes. *Bloom,* at 201-202.

(c) Whether or not a crime or criminal contempt is serious or petty depends upon objective standards, the most relevant of which is how society views the offense as evidenced by the penalty authorized by law. *Frank,* at 148-149.

(d) Where no legislative penalty is specified, seriousness (or pettiness) is judged by the penalty actually imposed. *Frank,* at 149; *Bloom,* at 211; *Dyke,* at 220.

(e) The dividing line between serious and petty offenses for federal courts is governed by Congressional intent, as expressed in 18 U.S.C. § 1(3).[10] *Frank,* at 150 fn.3; *Baldwin,* at 70-71; *Codiposti,* at 919; *Cheff,* at 379-380. See also, Anno: *Distinction Between "Petty" and "Serious" Offenses for Purposes of Federal Constitutional Right to Trial by Jury*— Supreme Court Cases, 26 L.Ed.2d 916 (1970).

None of the cases thus far referred to expressly involve or deal with jury entitlement where a fine alone, rather than imprisonment, is the sentence imposed. Nor do such cases expressly concern imposition of a sentence upon an organization such as Local 70.

The Sixth Circuit, in *United States v. Polk,* 438 F.2d 377 (1971)[11] held that a fine of $5,000 imposed upon a corporate defendant entitled such defendant to a jury trial because the fine exceeded the $500 line drawn by 18 U.S.C. § 1. *Polk* was considered to be "well reasoned" by the First Circuit in *In Re Puerto Rico Newspaper Guild Local 225,* 476 F.2d 856, 858 (1973). But, the First Circuit declined to consider the merit of *Polk's* holding, inasmuch as the case before it involved $500 fines for separate violations which, only when aggregated, exceeded the

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[10] "[N]otwithstanding any Act of Congress to the contrary . . . [any] misdemeanor, the penalty for which does not exceed imprisonment for a period of six months or a fine of not more than $500, or both, is a petty offense."

[11] See, also, *North American Coal Corp. v. Local 2262, United Mine Workers of America,* 497 F.2d 459, 467, n.4 (6th Cir. 1974).

limits of 18 U.S.C. § 1(3).[12] The Court of Appeals below, without much discussion, refused to follow *Polk*, 492 F.2d 929, 937, n.8.[13]

A. Jury Trial Is Required Whether A Sentence is By Fine or By Imprisonment.

Neither Article III, § 2 nor Amend. VI[14] distinguish between crimes or criminal punishment based upon imprisonment or fine. Petitioners concede that at first blush, there is a certain emotional appeal for refusing to equate a fine with a sentence imposing imprisonment. See opinion below, 492 F.2d 929 at 937, n.9. But there is no reason in history or in law to

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[12]The First Circuit, however, in *In Re Union Nacional de Trabajadores*, 502 F.2d 113 (1st Cir. 1974), construed the *Puerto Rico Newspaper Guild* case as requiring a jury trial when a fine for a single offense exceeds $500.00. 502 F.2d 113 at 116. *Codiposti* and *Taylor* were decided after decision in *Puerto Rico Newspaper Guild*, and would require a different result in it than was reached.

[13]Other cases in which the issue involved here is discussed were either decided before *Bloom;* e.g., *In Re Holland Furnace Co.*, 341 F.2d 548 (7th Cir. 1965), *cert. denied*, 381 U.S. 924 (1965), or before *Baldwin;* see, e.g., *Rankin v. Shanker*, 23 N.Y.2d 111 (242 N.E.2d 802, 1968, *stay denied*, 393 U.S. 930, 1968). Still other cases have rejected *Polk;* e.g., *McGowan v. State*, 258 So.2d 801 (Miss., 1972), *cert. denied*, 409 U.S. 1006 (1972), in which the Court merely said without discussion that an organization can be treated differently than an individual for purposes of entitlement to jury trial; and *In Re Fair Lawn Educ. Ass'n*, 63 N.J. 112, 305 A.2d 72, *cert. denied*, 414 U.S. 855 (1973), in which reliance was placed upon local statutory safeguards to justify denial of jury trial. These included a hearing before a judge other than the one whose order was violated, and requiring clearly defined and separate criminal contempt proceedings from civil contempt proceedings.

[14]"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury . . ." Art. III § 2, U.S. Const.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . ." Amend. VI, U.S. Const.

support any such distinction for purposes of jury entitlement.

Fines have been used throughout history as an alternate or supplemental method of punishment for crime, without regard for the seriousness or pettiness of offense. See Rubin: *The Law of Criminal Correction,* Chap. 7 (West Pub. Co., 1963). Rubin traces the practice of fines to the common law and the antecedent medieval Anglo-Saxon law, which included *"wergeld,"* the payment of a specific sum by one who caused the death of another; *"bot,"* compensation paid to a victime of crime; and *"deodond,"* the forfeiture of articles which were the instruments causing injury or loss; and fines were used as serious punishment in other criminal law systems such as the *multa* in Roman law, the *amende* in French law, and the *geldestrope* in German law. *Id.,* n.9 at 522. The use of fines in serious cases led to such abuses of governmental power that a prohibition against "excessive fines" was incorporated in the English Bill of Rights of 1688, and later in Amend. VIII. *Id.* at 223, 1 Stephen, *History of the Criminal Law of England* 57 (1883).

In the United States, fines have been imposed for both serious and less serious offenses, especially where the offending party is an organizational entity. See Seagle, Fines, 6 Encyc. Soc. Sci. 249, 250 (1931). In *United States v. United Mine Workers of America,* 330 U.S. 258 (1946), a heavy, albeit reduced, fine was explained to be justified in order to emphasize the gravity of a union's disobedience to a court order.

Utilization of fines against organizations, which by their nature cannot be jailed, or against individuals[15] hardly means that a fine is not serious, or that the offense for which it is imposed must be, because of its imposition, a petty one.

Denial of trial by jury for petty offenses has nothing to do with whether or not a jail sentence or fine, or both, are imposed. Instead, jury trials are denied for petty offenses because *historically,* a criminal offense deemed to be petty was not tried by jury. *Duncan,* at 159; Frankfurter and Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial By Jury,* 39 Harv. L. Rev. 917 (1926).

The fact that imprisonment *is* imposed is not determinative of the question as to when an offense is serious or petty. Imprisonment for six months or less is imprisonment just the same. But an offense for which a sentence of six months or less is imposed is deemed to be petty for jury trial purposes because of the need to balance rights of accused with the desirability of convenient and early disposition of criminal cases. *Baldwin,* at 73. Petitioner does not doubt that an early and convenient disposition of injunctive relief, such as was sought by respondent, is desirable. Such a need is fully met by utilization

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[15]While an individual may not be imprisoned for failure to pay a fine solely because of indigency, imprisonment for failure to pay a fine imposed is not constitutionally prohibited. *Tate v. Short,* 401 U.S. 395 (1971); *Williams v. Illinois,* 399 U.S. 235 (1970); *Morris v. Schoonfield,* 399 U.S. 508 (1970).

of civil contempt proceedings,[16] which do not require jury trial. When, however, criminal sanctions are imposed, there is no more need to weight the scales of convenience against an accused merely because the sentence is a fine, rather than imprisonment.

This Court has recognized that a fine upon a union for criminal contempt can be serious. *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers, Local 70,* 415 U.S. 423, 448 (1974). Here, petitioner, already subject to civil penalties of $21,000, is faced with additional criminal sanctions of at least $10,000.

The reason for having jury trials in serious offenses is just as applicable where a sentence is a fine as when a sentence is imprisonment; i.e., to "prevent oppression by the Government." *Duncan* at 155. In cases of criminal contempt, potential and actual judicial abuses are the same, whether or not a fine or imprisonment is the sentence decreed. *Bloom,* 206-209. The danger for abuse and misuse of contempt power is even greater where, as here, the order of contempt was sought by an arm of government, the N.L.R.B., and the trial was heard by the same judge who signed the order. It is not surprising that in recent years, the conviction rate for violation of N.L.R.B.-sought injunctions has jumped to 91%. Bartosic and Lanoff,

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[16] *Shillitani* teaches that a judge always should utilize civil contempt power to obtain and coerce obedience to judicial orders. Criminal sanctions should be resorted to only in the most serious situations. 384 U.S. 364, 371, n. 9.

Escalating the Struggle Against Taft-Hartley Contemnors, 39 U. Chi. L. Rev. 255, 258 (1972).[17]

Requiring jury trials in criminal contempt cases where serious fines are imposed does not deprive courts of their power to convict or to sentence for criminal violations of court orders. It merely requires that before a serious fine can be levied, jury trial on the criminal charge must be had.

B. The Objective Standard of 18 U.S.C. § 1(3) Governs As To Whether or Not A Crime Is Serious For Purposes of Jury Trial.

This Court has remained resolute in its commitment "to the proposition that 'criminal contempt is not a crime of the sort that requires the right to jury trial regardless of the penalty involved.'" *Taylor,* at 906. Similarly, the Court has been resolute in drawing the line between serious and petty offenses for purposes of jury entitlement, on the basis of society's view of the offense as evidenced by the degree of punishment imposed. *Cheff,* at 379; *Bloom,* at 211; *Dyke,* at 219; *Baldwin,* at 68; and *Taylor,* at 906.

Earlier cases took into consideration the nature of offense. *Callan v. Wilson,* 127 U.S. 540 (1888); *District of Columbia v. Colts,* 282 U.S. 63 (1930); and earlier cases considered also the actual penalty imposed as being the most relevant gauge to society's view, when the offense itself was not considered to

[17]More frequently than not, a sentence is determined, "not by the nature of the offender, or the offense, but by the nature of the sentencing judge," Gaylin, *Partial Justice, A Study of Bias in Sentencing* (Alfred A. Knopf, 1974). See, also, *Bloom* at 202, n.4.

be inherently evil. *Schick v. United States,* 195 U.S. 65 (1904); *District of Columbia v. Clawans,* 300 U.S. 617 (1937).

Clawans' "counsel" (see *Duncan,* at 161) to seek "objective" criteria has led this Court to draw the line between serious and petty offenses by referring to existing "laws and practices" in the nation. *Baldwin,* 399 U.S. 66, 70. Thus, 18 U.S.C. § 1(3) has become the dividing line for federal offenses (*Cheff,* at 379; *Frank,* at 219), and its provisions have emerged as the dividing line for requiring jury trials in state cases. *Baldwin,* at 68; *Codiposti,* at 919, n.4.

"Objective" criteria must be sought in deciding whether an offense is petty or serious. *Baldwin,* at p. 68; *Frank,* at p. 152. The dollar amount contained in 18 U.S.C. § 1(3) is just as relevant for purposes of fines as it is for imprisonment.[18] It reflects society's view of what is petty and what is serious, as determined by society's legislative representatives.[19]

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[18]There is nothing in the history of 18 U.S.C. § 1(3) which justifies any distinction between fines and imprisonment for purposes of determining whether a crime is serious or petty. See, H. R. Report No. 304, pp. A2-A4 80th Cong., 1st Sess., 1947.

[19]Most states which have imposed monetary limitations upon allowable fines for contempt have restricted the amount to $500 or less. Only three states specifically authorize fines up to $1,000, and the remaining states impose no limitations upon either the extent of fines or imprisonment. 8 Wm. & Mary L. Rev. 76, 90-100, Appendix. See, also, *Bloom* at 206, n.8.

It is interesting to note, too, that when Congress adopted contempt provisions in the Civil Rights Act of 1957, 42 U.S.C. § 1971(e), 1975(g), jury trial was granted where a fine imposed exceeded $300. 42 U.S.C. § 1995. See, also, *Bloom,* at 204, n.6.

The National Commission on Reform of Federal Criminal Laws: Study Draft of a New Federal Criminal Code (U.S. Govt. Printing Office, 1970) classifies contempt by disobedience of a court order

There is considerable wisdom in utilizing 18 U.S.C. § 1(3) as the dividing line for serious and petty fines. It provides courts and those accused of crime with certainty as to when a jury is required, and it avoids a hodge-podge of absurd results which may be brought about by varying extrinsic factors such as inflation, high employment, unemployment, personal or organizational wealth or lack of wealth at any given point in time (a factor which will vary for an endless number of reasons).

Subjective considerations may make sense in deciding whether or not a fine imposed is constitutionally "excessive." Amend. VIII, U.S. Const.; *United States v. United Mine Workers, supra.* But these considerations, deemed valid under the Eighth Amendment, do not meet the requirement of *objective standards* for purposes of Art. III, § 2 and Amend. VI.[20] *Baldwin; Frank; Polk, supra,* at 380.

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as a Class A misdemeanor, subject to unlimited fine or imprisonment. § 1341(2). However, the Commission does not take a fixed position on the length of sentence. Instead, it suggests terms of three, six or twelve months as possible limits, and it notes that twelve months may be more desirable. § 3204 and *Comment* thereto.

[20]The Constitutional provisions for jury trial impose the requirement without regard for the entity status of the criminally accused. The right to jury trial is attached, not to the accused, but to "trial of all crimes" and "in all criminal prosecutions." Petitioner, being subject to criminal prosecution (see, e.g., *Standard Oil Co. v. United States,* 221 U.S. 1 (1910)), can claim the same entitlement to jury trial as may a human defendant charged with crime. See also, *The National Commission on Reform of Federal Criminal Laws, supra,* §§ 402-405, working papers, pp. 167 *et seq.*

THE STATUTORY ISSUE

VIII

A SUMMARY OF THE STATUTORY FRAMEWORK

In 1932, Congress passed the Norris-LaGuardia Act, 29 U.S.C. § 101, 47 Stat. 70, which restricted the powers of the district courts to issue and enforce injunctions arising out of labor disputes. Section 4 of that Act, 29 U.S.C. § 104, forbade the issuance of any injunction whatsoever interfering with nine types of specified activity engaged in by workers or their organizations. Sections 7-10 imposed severe procedural and substantive limits on the injunctive process when applied in residual circumstances not absolutely proscribed in § 4.

Section 11, the predecessor of 18 U.S.C. § 3692, with which this case is concerned, provided for a jury trial in contempts of injunctions issued pursuant to §§ 7 through 10.

Norris-LaGuardia governed all injunctive decrees issued by the courts in labor disputes. In 1934, Congress attempted to create additional protection for workers in the National Labor Relations Act, 29 U.S.C. § 151, 49 Stat. 449. In §§ 10(e)-(h) of that law, courts of appeals were granted jurisdiction to enforce National Labor Relations Board orders against employers only. Nowhere were the courts given any power to issue any injunctions against unions, and therefore, there was no retreat from the principles enunciated so clearly in the Norris-LaGuardia Act.

In 1947, Congress substantially revised the Wagner Act with the Taft-Hartley amendments, the Labor Management Relations Act of 1947, 61 Stat. 136, *as amended*. This revision created new unfair labor practices chargeable against unions, and gave jurisdiction to the district courts to temporarily enjoin those unfair labor practices (including unfair labor practices against employers). For the first time in fifteen years, limited inroads in the Norris-LaGuardia principles were effected: courts were given jurisdiction to issue injunctions in labor disputes. 29 U.S.C. §§ 10(j) and (l). The power of the courts of appeals to enforce Board orders was continued, 29 U.S.C. §§ 10(e)-10(h), as before.

One year later, in 1948, the entire federal criminal law was recodified and revised into Title 18, "Crimes and Criminal Procedures," 62 Stat. 683.

At this time, § 11 of Norris-LaGuardia was repealed, and a new section was added to Title 18, § 3692, guaranteeing a jury trial "[i]n all cases of contempt arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute."

The interplay of § 11 of Norris-LaGuardia with its revision into § 3692 of Title 18, and two sections of the Taft-Hartley amendments, 29 U.S.C. §§ 160(h) and (l), is the issue before this Court.[21]

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[21]For a general discussion of the practical and legal framework surrounding contempt of these Board-obtained injunctions, see Bartosic & Lanoff, *Escalating the Struggle Against Taft-Hartley*

IX

SECTION 3692 IS UNAMBIGUOUS ON ITS FACE, AND MUST BE CONSTRUED IN FAVOR OF THE RIGHT IT GRANTS

A. Under a number of provisions of law, Congress has provided an absolute statutory right to a jury trial for federal criminal defendants.[22] This Court has not only given constitutional sanction to this authority,[23] but it has continually emphasized the validity of these statutory requirements.[24]

Section 3692, under which petitioners assert the right to a jury trial, is part of the Federal Criminal Code, which not only defines federal crimes, but also grants procedural protections to those accused in federal courts. Where rights of defendants are involved in criminal proceedings, this Court has evolved special tools and concepts for statutory construction.[25] In construing another section of Title 18, "Crimes and Criminal Procedure," in favor of the accused, this Court remarked: "that the interest of the United States in a criminal prosecution '. . . is not that it

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Contemnors, 39 U. Chi. L. Rev. 255 (1972). Each year, the Board reviews its contempt litigation in its annual report; e.g., "Thirty-Ninth Annual Report of the National Labor Relations Board for the Fiscal Year Ended June 30, 1974," 170-72 (N.L.R.B., 1974).

[22]See e.g., 42 U.S.C. § 1973(l)a; 42 U.S.C. § 1995; 42 U.S.C. § 2000(h); F.R.Crim.P. 42; 18 U.S.C. § 402; 29 U.S.C. § 528 and 18 U.S.C. § 3691. Part VII of this brief raises the constitutional issues inherent in the right to a jury trial.

[23]*Michaelson v. United States*, 266 U.S. 42 (1924).

[24]*Green v. United States*, 356 U.S. 165, 187, n.19 (1958); *Bloom v. Illinois*, 391 U.S. 194, 204, n.6 (1968); and *Frank v. United States*, 395 U.S. 147, 149, n.1 (1969). In each case, within the footnote indicated, this Court noted the impact of § 3692.

[25]In the proceedings in the district court, criminal rights were afforded the accused except that right asserted herein. See F.R. Crim.P. 42.

shall win a case, but that justice shall be done . . . .'" *Campbell v. United States,* 365 U.S. 85, 96 (1961).[26]

In this case, the literal meaning of the statute would grant James Muniz and Local 70 a jury trial. Of that, there should be no question. In an analogous case, this Court interpreted the breadth of F.R. Crim.P. 7(a), relating to the requirement that a prosecution proceed with an indictment, *Smith v. United States,* 360 U.S. 1, 9 (1959). When this Court was asked to "construe the provisions of the Rule loosely," it refused, "in view of the traditional canon of construction which calls for the strict interpretation of criminal statutes and rules in favor of the defendant where substantial rights are involved." *Id.* When asked to place a gloss on another section of the same Federal Criminal Code, the Court balked, "when a statute is designed to incorporate fundamental values . . ." *Sabbath v. United States,* 391 U.S. 585, 589 (1968). Only where the literal meaning of a statute produces "extraordinary results" does this Court consider whether extraneous sources, such as legislative history, require a gloss. *N.L.R.B. v. Allis-Chalmers Mfg. Co.,* 388 U.S. 175, 184 (1967). See also, *Banks v. Grain Trimmers Ass'n.,* 390 U.S. 459, 465 (1968). There is simply no need for extraneous or independent information, because a proper result is mandated by § 3692.

Fifty years ago, this Court considered a predecessor to 18 U.S.C. § 3691, which guaranteed a right to jury trial in specified circumstances. This Court refused

[26]Cf. F.R.Crim.P. 2.

to limit the plain meaning of that statute, and criticized the lower court's exercise in judicial legislation:

> "To say that railroad employees are outside the provisions of the statute is not to construe the statute, but to engraft upon it an exception not warranted by its terms. If Congress had intended such an exception, it is fair to suppose that it would have said so affirmatively. The words of the act are plain, and in terms inclusive of all classes of employment; and we find nothing in them which requires a resort to judicial construction. The reasoning of the court below really does not present a question of statutory construction, but rather an argument justifying the supposititious exception on the ground of necessity or of policy—a matter addressed to the legislative and not the judicial authority." *Michaelson v. United States, supra,* 266 U.S. at 68.

In the context of a criminal statute guaranteeing a fundamental right, the natural meaning of ordinary words cannot be ignored. There is no persuasive reason to impose any narrow meaning on § 3692.

B. Each and every element of § 3692 is present herein:

(1) Petitioners were charged with criminal contempt.

(2) A law "of the United States governing the issuance of injunctions or restraining orders" was the statutory basis for the district court's jurisdiction. 29 U.S.C. § 160(l).[27]

[27] References to subsections of 29 U.S.C. § 160 will be referred to to by the internal numbering system of the section. Thus, § 160(l) is § 10(l).

(3) This is a case growing out of a labor dispute.[28]

(4) The alleged contempt was not committed in the immediate presence of the court, nor did it concern the disobedience of any officer of the court.

The court below placed a restrictive gloss on § 3692, which effected a denial of this jury trial provision. Although the opinion does not completely reflect all the arguments made in favor of that interpretation, petitioners will consider those arguments advanced by the Board in the court below to support this restrictive reading.[29]

X

PETITIONERS WERE CHARGED WITH CONTEMPT ARISING OUT OF A LABOR DISPUTE WITHIN THE MEANING OF § 3692

The dispute out of which Local 70 and James Muniz were charged with contempt involved a strike at the Independent-Journal and subsequent alleged secondary boycott involving both consumers and delivery drivers. The phrase "labor dispute" is common to federal regulatory statutes. See 29 U.S.C. §§ 152 (a), 164(c); 113(a), (b), and (c); and 29 U.S.C.

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[28]The Board's assertion to the contrary is dealt with in Part X, *infra*.

[29]The arguments are contained in the brief of the Board to the Ninth Circuit, pp. 59-64. The First Circuit addressed these issues in *In Re Union Nacional de Trabajadores*, 502 F.2d 113 (1974). The opinion of the First Circuit is printed as an appendix to petitioners' supplemental brief to the petition for writ of certiorari, dated August 21, 1974.

§ 402(g). Any controversy over the terms and conditions of employment, "whether the disputants stand in the proximate relation of employer and employee" are labor disputes within the meaning of the Labor Management Relations Act. 29 U.S.C. § 159(9). Secondary boycotts are labor disputes. *Lauf v. E. G. Shinner & Co.*, 303 U.S. 323, 329 (1938); and *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552, 559-61 (1938). Norris-LaGuardia and Taft-Hartley have the same definition of a labor dispute. Cf. 29 U.S.C. §§ 152(9) and 113(c). The drafters of the definition in the 1935 Wagner Act stated that the language was lifted directly from that used in Norris-LaGuardia.[30] The same definition was continued by the 1947 amendments.[31] See 29 U.S.C. § 151 (industrial disputes). The National Labor Relations Board itself has recognized that the definition of a labor dispute used in the National Labor Relations Act is "substantially the same" as used in Norris-LaGuardia. *Tanner Motor Livery, Ltd.*, 148 N.L.R.B. 1402, 1403 (1964); and *N.L.R.B. v. Washington Aluminum Co.*, 370 U.S. 9, 15 (1962).

Of course, the term "labor dispute" is not strained to cover every controversy involving workers and their employers. For that reason, the courts have not applied § 3692 to contempts arising out of injunctions issued according to the authority of the Fair Labor Standards Act. 29 U.S.C. § 201-19, 52 Stat.

[30] I, *Legislative History of the National Labor Relations Act, 1935*, at 1348 (N.L.R.B., 1949).

[31] I, *Legislative History of the Labor Management Relations Act, 1947*, at 538 (N.L.R.B., 1948).

1060, *Mitchell v. Barbee Lumber Co.*, 35 F.R.D. 544, 547 (S.D. Miss. 1964); or violations of orders to specifically perform a collective bargaining agreement according to an arbitration award, *Philadelphia Marine Trade Ass'n v. Internat'l Longshoremen's Ass'n, Local 1291*, 368 F.2d 932, 934 (3d Cir. 1966), *rev'd on other grounds*, 389 U.S. 64 (1967).[32]

Notwithstanding the well-established meaning of labor dispute, the Board argued below that since an unfair labor practice was charged, no labor dispute was in fact involved withing the meaning of § 3692.[33] The court below seems to have reached the same conclusion, in stating that this case arose as part of "the

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[32]Because of subsequent history, this case is perplexing. The case stands chronologically between *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195 (1962), and *The Boys Markets, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235 (1970). The district court which issued the injunction presumed it could only do so if it could find that the dispute was outside the prohibitions of § 4 of Norris-LaGuardia. When the case reached this Court, it refused to reach the issue which it faced later in *The Boys Markets, Inc.* case. 398 U.S. at 73. The injunction against the strike pending further arbitration would now be permissible. The issue posed in Part XIV C, *infra*, is thus joined.

[33]See N.L.R.B. brief before the Ninth Circuit, pp. 61-63. The Board's position is inconsistent. As will be discussed subsequently, see Part XIII, *infra*, the Board claims that § 3692 has the same meaning as old § 11, 29 U.S.C. § 111, 47 Stat. 72, of the Norris-LaGuardia Act (and thus including only contempts arising out of injunctions issued under that Act). The Board at the same time has denied that "labor dispute" applies to the activity alleged herein. The inconsistency is that the definition of "labor dispute" contained in both the Norris-LaGuardia Act and the Taft-Hartley Act are exactly the same. On the one hand, the Board claims that § 3692 is derived from and limited to § 11 of the Norris-LaGuardia Act. On the other hand, the Board claims that the term "labor dispute" contained therein is not the same as that contained in Norris-LaGuardia. See *Mitchell v. Barbee Lumber Co., supra*, 35 F.R.D. at 546 (definition of labor disputes in § 3692 same as in Norris-LaGuardia).

administrative scheme of the Labor Management Relations Act and its amendments." 492 F.2d at 934. The gloss placed upon the term "labor dispute" to exclude labor disputes where unfair labor practices are committed is contrary to the plain meaning of this term.[34]

The short of the matter is that the term "labor dispute" is common to Federal statutes involving labor relations, and concerns the kind of alleged boycotting and strike activity involved herein.

XI

SECTION 10(h) DOES NOT EXEMPT 10(l) INJUNCTIONS FROM THE PROVISIONS OF SECTION 3692

Nowhere does § 10(h), 29 U.S.C. § 160(h)[35] exclude injunctions issued under the authority of § 10(l) from

[34]Chief Judge Coffin, writing for the First Circuit, noted the ultimate contradiction in the Board's position:

> "That the language of § 3692 would facially apply to many NLRA injunction situations, such as this one, is borne out by the source of the language itself, apparently section 1 of the Norris-LaGuardia Act, 29 U.S.C. § 101. That section applies to cases 'involving or growing out of a labor dispute.' If that language did not apply to at least some NLRA situations, there would be no reason for Congress to include a provision stating that section 1 did not apply to certain parts of the NLRA. Yet of course Congress did include such a provision in section 10(h) of the NLRA, 29 U.S.C. § 160(h), which specifically exempted the jurisdiction of courts 'sitting in equity' under section 10 of the NLRA, 29 U.S.C. § 160, from the limitations of Norris-LaGuardia." *In Re Union Nacional de Trabajadores,* 502 F.2d at 118.

[35]Section 10(h) reads in its entirety:

> When granting appropriate temporary relief or a restraining order, or making and entering a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part an order of the Board, as provided in this section, the jurisdiction of courts sitting in equity shall not be limited by the Act entitled "An Act to amend the Judicial Code and to define and limit the jurisdiction of courts sitting in equity, and for other purposes," approved March 23, 1932 (U.S.C., Supp. VII, title 29, secs. 101-115).

the provisions of Norris-LaGuardia or § 3692. The Board's argument[36] to the contrary requires that three consecutive inferences be drawn: (1) Because § 10(h) applies to "temporary relief or a restraining order" this includes the "injunctive relief" obtained pursuant to § 10(l); (2) the language of § 10(h) applies to except from all the provisions of Norris-LaGuardia those injunctions obtained pursuant to § 10(l); including, in particular the § 11 right to a jury trial; (3) The § 3692 right is a mere continuation of § 11 of Norris-LaGuardia. None of these inferences can properly be drawn. That the history of § 10(h) establishes that its provisions have absolutely nothing to do with the type of injunction obtained herein pursuant to § 10(l)[37] is discussed in Part A, *infra.* Secondly, that the language of § 10(h) indicates that it serves no greater purpose than a naked grant of jurisdiction to the courts of appeal is considered in Part B, *infra.* The third inference is the subject of Part XIII, *infra.*

A. The Board's authority to obtain injunctive relief to prohibit certain unfair labor practices in the district courts is grounded solely on § 10(l) itself; §10(h) applies only to the enforcement of Board orders in the courts of appeal.[38] A brief outline of the

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[36]See NLRB brief before the Ninth Circuit, p. 60.

[37]See, generally, "The Labor Management Relations Act and the Revival of the Labor Injunction," 48 Col. L. Rev. 759, 760-62 (1948).

[38]Although the opinion of the Ninth Circuit mentions only § 10(l), the Board urged the impact of § 10(h) in its brief to that court, p. 60. Other courts, without discussion, have errone-

statutory scheme will illustrate this. The administrative-adjudicative scheme envisions Board investigation of charges filed by an interested party. § 10(b). A Board hearing is held, and if the charges are proven, the Board issues an appropriate order. § 10(c). If the order is disregarded by the person found to have committed the unfair labor practice, the Board is empowered to seek temporary[39] or permanent injunctive relief in the courts of appeal, which possess the statutory enforcement function. § 10(e). As an administrative agency the Board lacks any power to enforce its orders except through these procedures.

§ 10(e) and similarly § 10(f) permit the court of appeals to enforce a Board order, and where necessary "to grant such temporary relief or restraining order as it deems just and proper." § 10(h) *in haec verba* grants the courts of appeal jurisdiction, notwithstanding the provisions of Norris-LaGuardia. The conjunction of identical language in §§ 10(e), 10(f), and 10(h) strongly implies that § 10(h) applies only to those enforcement orders sought in the courts

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ously assumed that § 10(h) applies to § 10(l). *E.g., Lebaron v. Printing Specialties & Paper Converters Union, Local 388*, 75 F.Supp. 678, 681 (S.D. Ca. 1948), *aff'd*, 171 F.2d 331 (9th Cir. 1948); *Madden v. Grain Elevator, Flour & Feed Mill Workers, etc.*, 334 F.2d 1014, 1020 (7th Cir. 1964), and *Penello v. I.L.A., Local 1248*, 78 L.R.R.M. 2009, 2013 (E.D. Va. 1971), *aff'd as modified*, 455 F.2d 942 (4th Cir. 1971). See also *In Re Union Nacional de Trabajadores, supra*, 502 F.2d at 119-20.

[39]Such temporary restraining orders are not uncommon to the courts of appeal. See, *e.g., N.L.R.B. v. Hospital & Institutional Workers, Local 250*, 78 L.R.R.M. 2095 (9th Cir. 1971); and *Sears, Roebuck & Co. v. Carpet, Linoleum, etc., Local Union No. 419*, 397 U.S. 655, 658-59 (1970).

of appeal. However, no temporary or permanent relief is contemplated or authorized until the procedures outlined in §§ 10(b) through 10(d) have been exhausted. This is in deliberate contrast to the remedies provided for in § 10(l) (and similarly §10(j)) which are temporary and involve the district courts *prior* to the completion of Board procedures.

Secondly, the original inclusion of § 10(h) in the Wagner Act demonstrates that its purpose was and is limited solely to orders issued pursuant to §§ 10(e) and 10(f). "This provision was carried over from the original Act, and has no effect upon subdivisions (j) and (l), which are new provisions in the amended Act." *Douds v. Local 294, I.B.T.*, 75 F.Supp. 414, 418 (N.D. N.Y. 1947).[40]

When Taft-Hartley was enacted in 1947, Congress granted the Board new authority to seek relief in the district courts in § 10(l). At the same time, it continued almost verbatim §§ 10(e), (f), (g), and (h) of the old Wagner Act. There was no provision whatsoever for injunctive relief prior to 1947 in the district courts against any unfair labor practice. Contrary to § 10(l), no injunctive relief was ever permitted until the Board had found a violation after the hearing process mandated in §§ 10(b) and 10(c). When § 10(h) was enacted in 1935, it could apply only to the enforcement of Board orders sought against unfair labor practices after hearing and adjudication.

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[40] *Accord, Jaffee v. Newspaper & Mail Deliverers Union*, 97 F. Supp. 443, 451 (S.D. N.Y. 1951).

When §§ 10(e), (f), (g), and (h) were continued without significant change in the 1947 Taft-Hartley enactments, the purpose and scope of § 10(h) "remained unchanged in the amended act."[41] The debates did not indirectly or directly reflect any attempt to integrate §§ 10(h) and 10(l): they were entirely separate and distinct provisions.[42]

Thirdly, § 10(l) itself has its own independent jurisdictional language:

> "Upon the filing of any such petition, the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper. . . ."

The language and meaning of § 10(h) is superfluous to any authority necessary for § 10(l).[43]

B. The effect of § 10(h) is limited only to the equitable powers and not to the criminal contempt process. The First Circuit recognized that the language of § 10(h) did not affect anything more than the court's "jurisdiction sitting in equity."[44] Embraced

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[41]See I, *Legislative History of the Labor Management Relations Act, 1947* at 334 and 433.

[42]In H.R. 3020 (introduced by Mr. Hartley), § 10(h) was retained, § 10(l) was not even proposed. Only the Senate version, S. 1126, contained both provisions. The fact that § 10(h) was included without § 10(l) in the House version indicates the total independence of the section. *Id.* at 73-74 and 129-32.

[43]The reason why § 10(h) does not refer only to courts of appeal sitting "in equity" is because the district courts could also enter enforcement orders on the rare occasion when the courts of appeal were on vacation. This limited provision continues to exist in § 10(e).

[44]An extension of this was suggested by Campbell, J., dissenting in *In Re Union Nacional de Trabajadores*, 502 F.2d at 121-22. § 10(h) excludes its provisions from the application of Nor-

within the meaning of § 10(h) is only "granting appropriate temporary relief or a restraining order, or making and entering the decree enforcing, modifying, and enforcing as so modified . . . the jurisdiction of courts sitting in equity shall not be limited by the [Norris-LaGuardia Act] . . ." Nothing more is contained in that section. Focusing on the word "equity" found in § 10(h), the First Circuit noted:

> "We find it difficult to think of a court sitting to mete out punishment for past offenses as a court 'sitting in equity.' Criminal contempt proceedings can arise from proceedings begun in either law or equity. While 'contempt' generically may 'sound in' equity, a criminal contempt proceeding really stems from the inherent power of a court, not merely a chancellor, to vindicate its authority. It is sui generis. *United States v. Barnett,* 346 F.2d 99 (5th Cir. 1965)." 502 F.2d at 120. See, also, *Michaelson v. United States, supra,* 266 U.S. at 64-65.

Section 10(h) does not purport to impose any constraints on the criminal powers of any federal court.

A second independent reason is that § 10(h) itself speaks only in terms of granting jurisdiction: the rules of procedure, the substantive law, and the rights to a jury trial are defined and codified elsewhere. Norris-LaGuardia itself not only spoke in terms of "jurisdiction," but prescribed appeal procedures (§ 10); the standard of proof of agency (§ 6); a

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ris-LaGuardia only. Since § 3692 is not part of Norris-LaGuardia, § 10(h) does not purport to exclude the rights granted by § 3692. Such a holding is reasonable in light of the alterations made when § 111 of the Norris-LaGuardia Act was repealed.

duty "to make every reasonable effort to settle"; and the right codified in § 11 to a jury trial. The word "jurisdiction" contained in § 10(h) cannot be broadened beyond the court's power to issue the injunction.[45]

§ 10(h) is simply inapplicable and unrelated to orders obtained under § 10(l). § 10(h) does not operate in any way to remove or imply the removal of any right guaranteed by Norris-LaGuardia to the proceedings involved herein.

XII

SECTION 10(l) DOES NOTHING MORE THAN GRANT JURISDICTION TO THE DISTRICT COURT TO ISSUE TEMPORARY INJUNCTIONS.

Section 10(l) permits the Regional Director of the National Labor Relations Board to seek temporary relief in the district courts pending the conclusion of Board adjudication of certain unfair labor practice allegations involving unions.[46] Within the language of § 10(l), there is explicit grant of authority to the district courts to "have jurisdiction to grant such injunctive relief or temporary restraining order as it deems

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[45]Section 10(h) lifts in *haec verba* the language, "the jurisdiction of courts sitting in equity," from the title of Norris-LaGuardia. It is significant that the language "for other purposes" embodied in that title was not included in the language of § 10(h). That section purports only to reach jurisdictional limits imposed by Norris-LaGuardia, not the other restrictions of that Act. See *Bakery Sales Drivers Union v. Wagshal*, 333 U.S. 437, 442 (1948), but see n.38 and n.43 *supra*.

[46]See, "The Labor Management Relations Act and the Revival of the Labor Injunction," *supra*.

just and proper, notwithstanding any other provision of law. . . ."[47]

The Board has seized upon this language to claim that it was the intention of Congress to exempt § 10(l) proceedings from any provision of law, and in particular, those provisions of law which would grant alleged contemnors jury trials.

The First Circuit interpreted similar language in § 10(h) in its clear and narrow sense to relate to jurisdiction only. See *In Re Union Nacional de Trabajadores,* 502 F.2d at 119. The language does not directly or indirectly imply any other provisions of law, including § 3692, would be inapplicable to these injunctions. An acceptance of the Board position would require that every law, both statutory and court made, applicable to the injunctive process, would be rendered

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[47]It is worth comparing the language of Section 10(j), which does not employ the "notwithstanding any other provision of law" language:

> The Board shall have power, upon issuance of a complaint as provided in subsection (b) of this section charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filling of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

In Re Union Nacional de Trabajadores was a case arising under § 10(j), not § 10(l). The court did not discuss the jurisdictional grant language in § 10(j). Any distinction between § 10(j) and § 10(l) would seem improper, in view of the closely parallel provisions and purposes.

nugatory by the "notwithstanding any other provision of law" phrase.[48]

Section 10(l) does nothing more than grant certain powers of injunctive relief to the district courts, "notwithstanding any other provision of law" in certain narrowly defined labor disputes (those involving secondary boycotts or jurisdictional disputes) where an unfair labor practice charge has been both filed and investigated.[49] The Board places a reliance on six words within § 10(l) for the preposterous proposition that the courts have unlimited power beyond their basic jurisdiction to issue injunctions without regard to other well-established principles.[50] Once the court's

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[48]*Query:* Would the "notwithstanding any other provision of law" language exclude the provisions of Fed.R.Civ.P. 65(d) from injunctions issued under § 10(l)? Congress could not have intended such a wholesale repeal of all such laws.

[49]That this phrase grants jurisdiction only to issue injunctions, notwithstanding the Norris-LaGuardia Act, is the precise holding of *Bldg. & Construction Trades Council v. Alpert*, 302 F.2d 594 (1st Cir. 1962). *Accord, Compton v. Teamsters, Local 901*, 49 L.R.R.M. 2835 (D.P.R. 1962) (court may issue *ex parte* temporary restraining order), *temporary injunction granted*, 49 L.R.R.M. 2843 (D.P.R. 1962); *Lebaron v. Printing Specialties & Converters Union, Local 388, supra; Penello v. I.L.A., Local 1248, supra;* and *cf. In Re Union Nacional de Trabajadores*, 502 F.2d at 117, n.3.

[50]That Congress has created limited jurisdictional exceptions to portions of Norris-LaGuardia, while leaving intact other important provisions, is clear in this Court's ruling in *Boys Market, Inc. v. Retail Clerks Union, Local 770, supra*, discussed in Part XIV C, *infra*. When this Court held that § 4 of Norris-LaGuardia was no jurisdictional bar to the issuance of injunctions where a collective bargaining agreement contained grievance-arbitration machinery, it did not imply that other provisions of Norris-LaGuardia were weakened or limited. See *United States Steel Corp. v. United Mine Workers of America*, 456 F.2d 483, 487-89 (3d Cir. 1972); *New York Telephone Co. v. Communication Workers of America*, 445 F.2d 39, 49-50 (2d Cir. 1971); *but see Granny Goose Foods, Inc. v. Brotherhood of Teamsters, Local 70, supra*, 415 U.S. 423, 445, n.19 (1974).

jurisdiction has been established, other recognized principles of law regarding the breadth of injunctions, the process of modifying those injunctions, and their enforcement through contempt are thereafter applicable.[51]

XIII

THE SCOPE OF SECTION 3692 IS NOT RESTRICTED TO CONTEMPTS ARISING OUT OF NORRIS-LAGUARDIA INJUNCTIONS.

A. Section 3692 is unambiguous, and applies to "all cases of contempt . . . involving or growing out of a labor dispute. . . ." Notwithstanding this explicit language, the court below concluded that "[t]here is no reason to believe that Congress intended its grant

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[51] The legislative debate surrounding the 1947 enactment of § 10(l) offers no indication that Congress meant that "notwithstanding any provision of law" language to eliminate all the salutary principles of Norris-LaGuardia. Opponents of the amendments recognized that Norris-LaGuardia provisions were weakened by the Taft-Hartley proposals. I & II, *Legislative History of the Labor Management Relations Act, 1947, supra,* 467, 480, 481, 691, 876, 887, 1047, 1455, and 1585-86. Others emphasized that the Board's new injunctive powers would not deprive unions of rights secured by Norris-LaGuardia. *Id.*, at 985, 1057, 1544. Debate often centered on the relationship between other proposals (such as § 303) and Norris-LaGuardia, unrelated to the § 10(l) issue at bar. *E.g., id.* at 1375-90 (Aiken amendment). There is one oblique reference to contempt which is totally uninstructive. *Id.* at 1068. The only reference in the entire debates to § 11 of Norris-LaGuardia is contained during the debate on the Ball amendment. That amendment, *inter alia,* would have permitted employers to seek injunctions against secondary boycotts and jurisdictional strikes.

In the debate over these amendments, Senator Ball referred to the provisions of § 11, *Id.* at 1348-49. Although stating "that when the Regional Attorney of the N.L.R.B. seeks an injunction, the Norris-LaGuardia Act is completely suspended. . . .", *id.* at 1348,

of equitable powers to district courts as embodied in section 10(l) of the Act, 29 U.S.C. § 160(l), to be repealed by the recodification of section 11 of the Norris-LaGuardia Act, 29 U.S.C. § 111, into 18 U.S.C. § 3692 [citations omitted]." 492 F.2d at 934[52]

Unfortunately the court below misstated the issue. Section 10(l) does not concern the contempt power of the district court.[53] The issue is rather whether the revision process by which § 3692 evolved out of § 11 was meant to imply that the new code section was restricted in scope to that of its predecessor.

Section 11 of Norris-LaGuardia, on which § 3692 is based, read prior to its repeal:

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this is dictum; the discussion concerned whether private employers should be able to obtain injunctions against certain strikes and boycotts. Senator Ball's sweeping characterization was meant to demonstrate the contrast between his proposals (which provided "that the Norris-LaGuardia Act shall not apply, with certain exceptions") and what he thought were the less restrained § 10(l) provisions. Senator Ball's attempt at irony (he was a vigorous supporter of greater injunctive power) is an unreliable statement in view of its context, and nowhere else is support found for this proposition in the debate. When Senator Ball noted his proposal left "in effect the provisions of section 11 and 12," no one rose to support or contradict the inference that § 10(l) would in any manner have that effect.

A few minutes later, Senator Ball retreated, and more carefully limited the effect of § 10(l) to "the fact that under the committee bill, the National Labor Relations Board attorney can go into court and obtain an injunction against the secondary boycott or jurisdictional strike, and the Norris-LaGuardia Act is completely suspended. . . ." *Id.* at 1352.

The vigorous opposition and sound defeat of the Ball amendment, *id.* at 1370, demonstrates that Congress wanted to leave intact the Norris-LaGuardia provisions.

[52]Each of the cases relied upon by the Ninth Circuit is distinguishable. None considered the precise question posed herein. See *In Re Union Nacional de Trabajadores, supra,* 502 F.2d at 117.

[53]See Part XII, *supra.*

> In all cases arising under this Act in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed: *Provided,* That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court.

In 1948, Congress enacted the Criminal Code, including § 3692, and repealed § 11. 62 Stat. 844, 866. Two significant changes appeared in the new section: (1) the previous restriction to "cases arising under this Act" was deleted; (2) the phrase "laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute" supplants the previous restrictive language.

The legislative history of § 3692 does not support the Board's claim that "the section [3692] was intended after the codification, just as before, to refer only to contempt proceedings under the Norris-LaGuardia Act." Brief of N.L.R.B. in Ninth Circuit, p. 60 (footnote omitted).

B. The events of the prior year, 1947, support the conclusion that the phrase "all labor disputes" is not meant to be restricted. One significant case intercedes in 1947. *United States v. United Mine Workers of*

America, 330 U.S. 258 (1947)[54] In 1946, the United States was in possession of and operated most of the bituminous coal mines in the United States. "[T]he relationship between the government and the workers [was] that of employer and employee." *Id.* at 289. Because the Government was exercising its sovereign power to operate the mines, this Court held that Norris-LaGuardia was inapplicable to the relationship between the Government and these employees. As a corollary, this Court held that no jury trial was mandated by § 11 of Norris-LaGuardia because that provision was "not operative . . ., for it applies only to cases arising under the Act, and we have already held that the restriction upon injunctions imposed by this Act cannot govern this case." *Id.* at 298 (footnotes omitted).

Section 11's inapplicability arose only from the section's plain restriction to Norris-LaGuardia injunctions.

From the effective date of Taft-Hartley in late summer, 1947, until June 28, 1948, the effective date of the new § 3692, an alleged contemnor of a Taft-Hartley injunction would probably have been denied the jury trial guaranteed by § 11 of Norris-LaGuardia, because the injunction would not have been one arising under Norris-LaGuardia itself. No reported case indicates any court faced this issue.

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[54]The events, including the contempt trial, occurred between October 21 and December 5, 1946. The matter was argued before this Court one month later, January 14, 1947. The decision was handed down March 6, 1947, one month before full Congressional debate on the Taft-Hartley amendments began, and one year before § 3692 was enacted.

C. Until the effective date of the Taft-Hartley amendments to the National Labor Relations Act in the summer of 1947, Norris-LaGuardia certainly governed all injunctions issued by federal courts in labor disputes.[55] During that fifteen-year period, courts had not limited the scope and reach of all thirteen sections of Norris-LaGuardia, except on a few rare occasions. Only when no "labor dispute" was involved with the Norris-LaGuardia definition contained in 29 U.S.C. § 113(c) had the courts limited its impact.[56] The term "labor dispute" was liberally interpreted, and was "intended to embrace controversies other than those between employer and employees . . ." *New Negro Alliance v. Sanitary Grocery Co., supra,* 303 U.S. at 560-61. When Congress enacted the Taft-

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[55]This assertion is true, with the very limited exception of the power of courts of appeal to enforce National Labor Relations Board orders against employers, granted by § 10(e), (f), (g), and (h) of the National Labor Relations Act of 1935. This power did not intrude on the principles of Norris-LaGuardia, which concerned injunctive power directed against labor. 29 U.S.C. § 102. From 1935 to 1947, the courts had occasion to consider the relationship between Norris-LaGuardia restrictions and the limited injunctive powers granted in 1935. See, generally, Note, "Accommodation of the Norris-LaGuardia Act to Other Federal Statutes," 72 Harv. L. Rev., 354, 357-60 (1958). The courts resolved any conflicts in favor of the purposes of Norris-LaGuardia: "The necessary inference is that in all other respects, the effect of the Norris-LaGuardia Act upon the jurisdiction of 'courts sitting in equity' was left unimpeded." *Donnelly Garment Co. v. Internat'l Ladies Garment Workers Union,* 99 F.2d 309, 315 (8th Cir. 1938), *cert. denied,* 305 U.S. 662 (1939). See also *Blankenship v. Kurfman,* 96 F.2d 450, 453-54 (7th Cir. 1938); *Internat'l Bro. of Teamsters v. Internat'l Union of Brewery, etc. Workers,* 106 F.2d 871, 876-77 (9th Cir. 1939); *Burlington Mills Corp. v. Textile Workers Union,* 44 F.Supp. 699 (W.D. Va. 1941); but see, *Oberman & Co. v. United Garment Workers of America,* 21 F.Supp. 20 (W.D. Mo. 1937).

[56]*Russell v. United States,* 86 F.2d 389, 393 (8th Cir. 1936); and *Hill v. United States ex rel. Weiner,* 84 F.2d 27, 31 (3d Cir. 1936), *rev'd on other grounds,* 300 U.S. 105 (1937).

Hartley amendments which embraced the same definition of labor disputes contained in the National Labor Relations Act, the term had its own meaning, virtually without limitation, and cannot reasonably be read in any exclusive manner.

Secondly, Congress was fully aware of *United States v. United Mine Workers.*[57]

The fact that Congress methodically eliminated the restrictive language of § 11 a year after *United States v. United Mine Workers* so that the new jury trial statute applied to all labor disputes, impels one conclusion:[58] the new statute applies universally to all labor disputes, not just those governed by Norris-LaGuardia.[59] Congress could not have intended the term "labor dispute" in § 3692 to mean anything less encompassing than that contained within the definition of Norris-LaGuardia and Taft-Hartley.

D. The legislative history of the recodification of "Title 18, Crimes and Criminal Procedures" does not reveal that Congress intended to restrict the impact

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[57]See I, *Legislative History of the Labor Management Relations Act of 1947* at 420, 1326 (N.L.R.B. 1948).

[58]Where the Court decides an important case, any Congressional enactments taking place shortly thereafter are presumed to be in full cognizance of the Court's holding. See *Auto Workers v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 273 (1956).

[59]Query: Would § 3692 require a jury trial after its amendment in 1948 in cases involving government employees? Plainly so, but see, *United States v. Robinson*, 449 F.2d 925, 931-32 (9th Cir. 1971). *Cf. American Postal Workers Union v. United States Postal Service*, 356 F.Supp. 335, 336 (E.D. Tex. 1972). Congress believed that *United States v. United Mine Workers* "did not hold in broad terms that the government was exempted from the Norris-LaGuardia Act." I, *Legislative History of the Labor Management Relations Act of 1947*, at 420 (N.L.R.B. 1948).

of § 3692 to injunctions "arising under this Act." The only limitation imposed in that section is that the injunction arise out of a "labor dispute."[60] Rather, the revisers intended to remove the restrictions relied upon by this Court in 1947:

> The phrase "or the District of Columbia arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute" was inserted *and reference to specific sections of the Norris-LaGuardia Act* [§§ 101-115 Title 29, U.S.C. 1940 ed] were eliminated. (emphasis supplied) H.R. Rep. 304, 80th Cong., 1st Sess., p. A176.

This language indicates that Congress intended to expand the jury trial provision beyond the limitations provided in Norris-LaGuardia.[61]

Nor was the Criminal Code enactment in 1945 only a "specific transposition to Title 18 of § 11." Brief of the Board to the Ninth Circuit, p. 60. This belies the massive undertaking reflected in the process of revision, which led to the whole revised Criminal Code:

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[60]The proviso contained in the second paragraph indicates Congress full well applied all substantive restrictions it thought applicable.

[61]It is significant that H.R. 2200, 79th Cong., 2d Sess. (1946), proposed a different § 3692:

> "In all cases of contempt in any court of the United States or the District of Columbia arising under the laws of the United States governing the issuance of injunctions or restraining orders in any case involving or growing out of a labor dispute, the accused shall, enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the contempt shall have been committed."

The subsequent deletion of the reference to "in any court of the United States or the District of Columbia" further indicates Congress' intent to make the statute universally applicable.

> "Several preliminary drafts of the revision were studied most carefully, word for word, and line for line, by these various groups, culminating in the bill now up for consideration." 93 Cong. Rec. 5049 (1947) (Congressman Robsion)

Moreover, these were revisions of former law, not mere recodifications. *Ibid.*, 5048-49.[62]

The 1948 enactment of § 3692 reflects an attempt by Congress to correct the omission pointed out by this Court in *United States v. United Mine Workers,* and to broaden its scope to all labor disputes.

XIV

THE NECESSARY POWER OF THE COURTS TO COERCE COMPLIANCE WITH INJUNCTIONS IS PRESERVED

A. The usual and effective remedy to insure compliance with court orders is civil contempt. *Shillitani v. United States, supra,* 384 U.S. 364, 371, n.9 and Bartosic and Lanoff, *Escalating the Struggles Against Taft-Hartley Contemnors, supra,* at 262. The civil remedy comports with the purpose of § 10(l) to effect immediate and temporary relief pending Board adjudication.

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[62]The thorough alteration of companion § 112 of Norris-LaGuardia into a much truncated version in F. R. Crim. P. 42 further indicates that Congress was not unwilling to alter the scope of Norris-LaGuardia as it applied to contempts. Where "changes in phraseology '. . . did not' change meaning or substance," or extend the scope of provisions, H. Rep. No. 304, 80th Cong., 1st Sess., p. A30, the revisers knew how to indicate such a process. This in fact was done to a closely related section, 18 U.S.C. § 402, which is based on the Clayton Act right to a jury trial, at issue in *United States v. Michaelson, supra. See, In Re Union Nacional de Trabajaderos,* 502 F.2d at 117, n.2.

The revision of section 11 into § 3692 is a two edged sword. While broadened in scope to all labor disputes, its provisions are withdrawn from civil contempt proceedings. Several courts have correctly reached this conclusion.[63] Petitioners accept this as consistent with the legislative history and purposes of the Taft-Hartley amendments.

B. The question is raised as to whether a jury trial is guaranteed where criminal contempt is charged of an injunctive order of a court of appeal. Several courts have held that the courts of appeal are not bound by § 3692.[64] Although this Court need not reach this issue, the necessary implication of the arguments advanced by petitioners is that this case may well settle that issue.

As noted above, Part XI § 10(h) does not alter the contempt power of the courts of appeal, but only their jurisdiction to issue injunctions. Petitioners do not shrink from the logic of this argument; the courts of appeal are also bound by the requirement of § 3692 when a petition alleging criminal contempt is filed.

C. The construction of § 3692 advanced by the Board would conflict with *The Boys Markets, Inc. v.*

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[63] *Philadelphia Marine Trades Ass'n v. International Longshoremen's Ass'n, Local 1291, supra; Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 380 F.2d 570 (D.C. Cir. 1967), cert. denied, 389 U.S. 327, 927 (1967); *N.L.R.B. v. Red Arrow Freight Lines*, 193 F.2d 979 (5th Cir. 1952); *Schauffler v. Local 1291, International Longshoremen's Association*, 189 F.Supp. 737 (E.D. Pa. 1960), *rev'd on other grounds*, 292 F.2d 182 (3rd Cir. 1961) and *Madden v. Grain Elevator, Flour & Feed Mill Workers*, 334 F.2d 1014, 1020 (7th Cir. 1964).

[64] *N.L.R.B. v. Red Arrow Freight Lines, supra*, and *Madden v. Grain Elevator, Flour and Feed Mill Workers, supra.*

Retail Clerks Union Local 770, 398 U.S. 235 (1970) and *Brotherhood of Railway Trainmen v. Chicago River & Indiana R.R. Co.,* 353 U.S. 30, *reh. denied,* 353 U.S. 948 (1957).

In *The Boys Markets, Inc. v. Retail Clerks Union, Local 770,* this Court held that "[t]he literal terms of § 4 of the Norris-LaGuardia Act must be accommodated to the subsequently enacted provisions of § 301(a) of the Labor-Management Relations Act . . ." 398 U.S. at 250. This Court refused to "undermine the validity of the Norris-LaGuardia Act," and dealt "only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure." *Id.* at 253. The "Norris-LaGuardia Act does not bar the granting of injunctive relief in the circumstances of [that] case. . . ." With that decision, an exception to Section 4 of the Norris-LaGuardia Act was created, which doctrine encompasses the vast majority of injunctions presently issued by the federal courts in labor disputes.

In the case at bar, the Board argues that § 3692 is applicable only to those injuctions governed by Norris-LaGuardia itself. *Query:* Would criminal contempts of an injunction issued under the authority of *Boys Markets,* or *Chicago River* require a jury trial? One district court has empanelled a jury for trial of such a contempt.[65] *Restaurant Associates Industries*

[65]It is worth considering that such a restriction on § 3692 would render its impact virtually meaningless. If one were to exclude all injunctions issued under Norris-LaGuardia, and all injunctions issued under 29 U.S.C. § 185(a) and the Railway Labor Act, virtually no injunctions issued out of labor disputes would require a jury trial.

v. Local 71, 79 L.R.R.M. 2502, 2506, n.4 (E.D. N.Y. 1972).[66] The Board's position that labor injunctions issued outside of Norris-LaGuardia do not require the application of § 3692[67] would remove the limited exception to Norris-LaGuardia created in the *Boys Markets* into a total repudiation of that Act. There is simply no purpose to be perceived by such a limitation in exactly those circumstances where such a jury was most intended by the enactment of Norris-LaGuardia.

XV

CONCLUSION

It is therefore respectfully submitted that the decision of the court below should be reversed.

Respectfully submitted,

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[66]Cf. *North American Coal Corporation v. Local Union 2262, United Mine Workers of America,* 497 F.2d 459, 467, n.4 (6th Cir. 1974).

[67]This could be extended to the recodification of § 112 of Norris-LaGuardia into F. R. Crim. P. 42.